

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Charles Robert Adams,	)	
	)	
Petitioner,	)	CIV 13-01782 PHX ROS (MEA)
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
Charles L. Ryan, et al.,	)	
	)	
Respondents.	)	
	)	
_____	)	

**TO THE HONORABLE ROSLYN O. SILVER:**

Petitioner, proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on or about August 29, 2013. Respondents filed a Limited Answer to First Amended Petition for Writ of Habeas Corpus ("Answer") (Doc. 14) on January 29, 2014. Any reply to the answer to the petition was due on or about March 1, 2014. The matter was reassigned to the undersigned magistrate judge on June 30, 2014.

**I Procedural History**

A Maricopa County grand jury indictment returned May 3, 2005, charged Petitioner with two counts of sexual conduct with a minor, class 2 felonies and dangerous crimes against children (Counts 1 and 2), and one count of child abuse, a class 2 felony and dangerous crime against children (Count 3). See Answer, Exh. B. The indictment alleged that, on or between January 1,

1 2004, and November 18, 2004, Petitioner sexually abused and  
2 endangered the person or health of A.M., a male child under the  
3 age of 15 years old, while A.M. was in Petitioner's care or  
4 custody. Id., Exh. B & Exh. M.

5 Counsel was appointed to represent Petitioner and the  
6 case proceeded to trial. See id., Exh. C. At the conclusion of  
7 the state's case, the trial court granted Petitioner's motion  
8 for a directed verdict as to Count 1 and dismissed this charge.  
9 Id., Exh. D. At the conclusion of the five-day trial, the jury  
10 convicted Petitioner of Counts 2 and 3, which had been  
11 renumbered as Counts 1 and 2. Id., Exh. E. On June 27, 2006,  
12 pursuant to these convictions, Petitioner was sentenced to a  
13 term of life imprisonment with no possibility of parole for  
14 thirty-five years (Petitioner was forty years old at the time of  
15 sentencing) pursuant to his conviction on Count 1 and to a  
16 consecutive term of seventeen years imprisonment pursuant to his  
17 conviction on Count 2. Id., Exh. F.

18 Petitioner took a timely direct appeal of his  
19 convictions and sentences. Id., Exh. H. On August 24, 2007,  
20 Petitioner's appointed appellate counsel filed an opening brief  
21 pursuant to Anders v. California, 386 U.S. 738 (1967), stating  
22 that he had thoroughly reviewed the record and found no  
23 appealable question of law. Id., Exh. I. Petitioner's counsel  
24 filed a motion for leave to allow Petitioner to file a  
25 supplemental brief on his own behalf. Id., Exh. J. On August  
26 29, 2007, the Arizona Court of Appeals granted the motion and  
27 provided a deadline of October 15, 2007, for Petitioner to file

1 a supplemental brief. Id., Exh. K. On August 31, 2007,  
2 Petitioner's counsel sent Petitioner a copy of all records on  
3 appeal. Id., Exh. L. Petitioner did not file a supplemental  
4 brief. Id., Exh. M.

5 On March 25, 2008, the Arizona Court of Appeals issued  
6 a memorandum decision affirming Petitioner's convictions and  
7 sentences. Id., Exh. M. On March 26, 2008, Petitioner's  
8 appointed appellate counsel sent Petitioner a letter informing  
9 Petitioner that counsel had reviewed the Arizona Court of  
10 Appeals' decision and he concluded that there was no reasonable  
11 probability that the Arizona Supreme Court would review his  
12 case. Id., Exh. N. Counsel advised Petitioner that, if  
13 Petitioner wished to seek review on his own he was required to  
14 file a petition for review within thirty days of March 25, 2008.  
15 Id., Exh. N. Petitioner did not file a petition for review and  
16 on May 12, 2008, the Arizona Court of Appeals issued an order  
17 and mandate. Id., Exh. O.

18 On May 29, 2008, Petitioner initiated an action for  
19 state post-conviction relief pursuant to Rule 32, Arizona Rules  
20 of Criminal Procedure. Id., Exh. P. On June 11, 2008, the state  
21 trial court appointed counsel to represent Petitioner in his  
22 Rule 32 action. Id., Exh. Q. On September 4, 2008, counsel  
23 filed a notice of completion of post-conviction review, finding  
24 no colorable claims to be raised on Petitioner's behalf, and  
25 requesting an extension of time for Petitioner to file a pro per  
26 Rule 32 petition. Id., Exh. R. On December 12, 2008, Petitioner  
27 filed a pro per PCR petition, arguing that:

1 (1) the trial court violated Arizona Rules of  
2 Evidence, Rule 403 by granting the State's  
3 motion pursuant to Rule 404(c) and denying  
4 the motion pursuant to 404(b);

5 (2) the court should provide some type of  
6 case law that would allow the trial court to  
7 dismiss the charges against Petitioner when  
8 the victim fails to make an in-court  
9 identification of Petitioner;

10 (3) the judge was biased or erred for not  
11 allowing an answer to a question of whether  
12 there was a confession from Petitioner, and  
13 instead sustaining the hearsay objection to  
14 the question; and

15 (4) his trial counsel was ineffective when he  
16 failed to "see the special action, [regarding  
17 the 404(b) and 404(c) motion filed by the  
18 prosecutor,] through to the court of appeal  
19 for them to make a ruling" and when he failed  
20 to file a motion in limine "to resolve the  
21 issue of hearsay evidence being admissible at  
22 trial." (Exh. S.)

23 Id. at 4-5.

24 On June 30, 2009, the state trial court denied relief,  
25 finding Petitioner's first three claims precluded by Rule  
26 32.2(a)(3) of the Arizona Rules of Criminal Procedure and  
27 finding Plaintiff had failed to raise a colorable claim for  
28 relief on his fourth claim, ineffective assistance of counsel.

Id., Exh. W. Petitioner did not seek review by the Arizona  
Court of Appeals.

On September 2, 2009, Petitioner filed a second post-  
conviction petition, docketing the same petition he had filed on  
December 12, 2008, but changing the date to August 24, 2009, and  
adding two documents to the end of the exhibits. Id., Exh. X.  
This petition was dismissed on February 22, 2010, "[b]ecause  
[Petitioner] raised the claim of ineffective assistance of  
counsel in his of-right PCR and that claim was adjudicated,

1 Defendant's repetitive claim of ineffective assistance of  
2 counsel is precluded." Id., Exhs. Y & Z. The trial court  
3 further found that Petitioner had "raised no other claim falling  
4 within any of the exceptions for a successive PCR." Id., Exh.  
5 Z. Petitioner did not seek review of this decision by the  
6 Arizona Court of Appeals. Id., Exhs. HH, II, JJ.

7           On August 12, 2010, Petitioner docketed a third Rule 32  
8 petition, arguing that the state engaged in vindictive  
9 prosecution when it introduced unlawful testimony at trial.  
10 Id., Exh. AA. The petition was dismissed on September 3, 2010,  
11 the state court finding the petition was untimely and that "an  
12 untimely notice may only raise claims pursuant to Rule 32.1(d),  
13 (e), (f), (g) or (h). Ariz. R. Crim. P. 32.4(a)," and Petitioner  
14 "fails to state a claim for which relief can be granted in an  
15 untimely Rule 32 proceeding. Rule 32.4(a)." Id., Exh. BB & Exh.  
16 CC. On October 12, 2010, Petitioner filed a petition for review  
17 with the Arizona Court of Appeals, which was dismissed as  
18 untimely. Id., Exhs. DD & JJ.

19           On January 28, 2013, Petitioner filed a fourth state  
20 post-conviction petition, arguing that his conviction and  
21 sentence were obtained in violation of his constitutional rights  
22 because he was coerced by the judge and that his prison sentence  
23 exceeded the maximum authorized by law. Id., Exh. EE. The  
24 petition was dismissed on February 13, 2013, as untimely and  
25 successive. Id., Exhs. FF & GG. Petitioner did not file a  
26 petition for review by the Arizona Court of Appeals.

1           On August 29, 2013, Petitioner filed the instant habeas  
2 petition in this Court.

3           (1) Petitioner alleges that his Fifth, Sixth,  
4 Eighth, and Fourteenth Amendments rights were  
violated by various rulings of the trial  
court;

5           (2) Petitioner alleges that his Fifth, Sixth,  
6 Eighth, and Fourteenth Amendments rights were  
violated by consideration of a pending Pinal  
County criminal case to enhance Petitioner's  
sentence;

7           (3) Petitioner alleges that his Fifth, Sixth,  
8 Eighth, and Fourteenth Amendments rights were  
violated by the admission of unreliable  
evidence; and

9           (4) Petitioner alleges that his Fifth, Sixth,  
10 Eighth, and Fourteenth Amendments rights were  
violated where the court never ruled on his  
11 motion to dismiss.

12 See Doc. 1 & Doc. 8.

## 13           **II Analysis**

### 14           **Statute of limitations**

15           The petition seeking a writ of habeas corpus is barred  
16 by the applicable statute of limitations found in the  
17 Antiterrorism and Effective Death Penalty Act ("AEDPA"). The  
18 AEDPA imposed a one-year statute of limitations on state  
19 prisoners seeking federal habeas relief from their state  
20 convictions. See, e.g., Espinoza Matthews v. California, 432  
21 F.3d 1021, 1025 (9th Cir. 2005); Lott v. Mueller, 304 F.3d 918,  
22 920 (9th Cir. 2002). The one-year statute of limitations on  
23 habeas petitions generally begins to run on "the date on which  
24 the judgment became final by conclusion of direct review or the  
25 expiration of the time for seeking such review." 28 U.S.C. §  
26 2244(d)(1)(A). The AEDPA provides that a petitioner is entitled  
27 to tolling of the statute of limitations during the pendency of  
28

1 a "properly filed application for state post-conviction or other  
2 collateral review with respect to the pertinent judgment or  
3 claim." 28 U.S.C. § 2244(d)(2). See also, e.g., Artuz v.  
4 Bennet, 531 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000); Harris v.  
5 Carter, 515 F.3d 1051, 1053 (9th Cir. 2008).

6 At the conclusion of Petitioner's direct appeal,  
7 Petitioner filed a state action for Rule 32 post-conviction  
8 relief, which tolled the running of the one-year statute of  
9 limitations. The statute of limitations began to run on July  
10 30, 2009, when the time expired for seeking review of the trial  
11 court's decision dismissing Petitioner's Rule 32 action by the  
12 Arizona Court of Appeals. Accordingly, the statute of  
13 limitations expired on July 29, 2010, and Petitioner's federal  
14 habeas action, filed in 2013, is not timely. None of  
15 Petitioner's subsequent actions for state post-conviction relief  
16 tolled the statute of limitations because none of these actions  
17 were "properly filed"; the trial court dismissed the proceedings  
18 because the petitions were each untimely and Arizona procedural  
19 criminal law precluded the claims. See Pace v. DiGuglielmo, 544  
20 U.S. 408, 414, 125 S. Ct. 1807, 1812 (2005); Allen v. Siebert,  
21 552 U.S. 3, 5-7, 128 S. Ct. 2 (2007) (holding that the Pace rule  
22 applies even where there are exceptions to the state-court  
23 filing deadlines, and reaffirming that a state court's rejection  
24 of a petition as untimely is "the end of the matter"); Zepeda v.  
25 Walker, 581 F.3d 1013, 1018 (9th Cir. 2009) (rejecting  
26 contention that state must prove that rules concerning time bars  
27 are "firmly established and regularly followed before  
28

1 noncompliance will render a petition improperly filed for AEDPA  
2 tolling").

3           The one-year statute of limitations for filing a habeas  
4 petition may be equitably tolled if extraordinary circumstances  
5 beyond a prisoner's control prevent the prisoner from filing on  
6 time. See Holland v. Florida, 130 S. Ct. 2549, 2554, 2562  
7 (2010); Bills v. Clark, 628 F.3d 1092, 1096-97 (9th Cir. 2010).  
8 A petitioner seeking equitable tolling must establish two  
9 elements: "(1) that he has been pursuing his rights diligently,  
10 and (2) that some extraordinary circumstance stood in his way."  
11 Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814-15  
12 (2005). See also Ford v. Gonzalez, 683 F.3d 1230, 1237 (9th  
13 Cir. 2012); Porter v. Ollison, 620 F.3d 952, 959 (9th Cir.  
14 2010); Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011-14 (9th  
15 Cir. 2009). In Holland the Supreme Court eschewed a "mechanical  
16 rule" for determining extraordinary circumstances, while  
17 endorsing a flexible, "case-by-case" approach, drawing "upon  
18 decisions made in other similar cases for guidance." Bills, 628  
19 F.3d at 1096-97.

20           The Ninth Circuit Court of Appeals has determined  
21 equitable tolling of the filing deadline for a federal habeas  
22 petition is available only if extraordinary circumstances beyond  
23 the petitioner's control make it impossible to file a petition  
24 on time. See Chaffer v. Prosper, 592 F.3d 1046, 1048-49 (9th  
25 Cir. 2010); Porter, 620 F.3d at 959; Waldron-Ramsey, 556 F.3d  
26 at 1011-14 & n.4; Harris v. Carter, 515 F.3d 1051, 1054-55 & n.4  
27 (9th Cir. 2008); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir.



1 2003), modified on other grounds by 447 F.3d 1165 (9th Cir.  
2 2006). Equitable tolling is only appropriate when external  
3 forces, rather than a petitioner's lack of diligence, account  
4 for the failure to file a timely habeas action. See Chaffer,  
5 592 F.3d at 1048-49; Waldron-Ramsey, 556 F.3d at 1011; Miles v.  
6 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling  
7 is also available if the petitioner establishes their actual  
8 innocence of the crimes of conviction. See Lee v. Lampert, 653  
9 F.3d 929, 933-34 (9th Cir. 2011).

10 Equitable tolling is to be rarely granted. See, e.g.,  
11 Waldron-Ramsey, 556 F.3d at 1011; Jones v. Hulick, 449 F.3d 784,  
12 789 (7th Cir. 2006); Stead v. Head, 219 F.2d 1298, 1300 (11th  
13 Cir. 2000). Equitable tolling is inappropriate in most cases  
14 and "the threshold necessary to trigger equitable tolling [under  
15 AEDPA] is very high, lest the exceptions swallow the rule."  
16 Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002).  
17 Petitioner must show that "the extraordinary circumstances were  
18 the cause of his untimeliness and that the extraordinary  
19 circumstances made it impossible to file a petition on time."  
20 Porter, 620 F.3d at 959. It is Petitioner's burden to establish  
21 that equitable tolling is warranted in his case. See, e.g.,  
22 Porter, 620 F.3d at 959; Espinoza Matthews v. California, 432  
23 F.3d 1021, 1026 (9th Cir. 2004); Gaston, 417 F.3d at 1034.

24 Petitioner has not filed a reply to Respondents'  
25 assertion that his petition is time-barred.

26 Petitioner has not stated an adequate basis for  
27 equitable tolling of the statute of limitations. Compare

1 Holland, 130 S. Ct. at 2564; Porter, 620 F.3d at 961 (noting the  
2 circumstances of cases determined before and after Holland). A  
3 petitioner's pro se status, ignorance of the law, and lack of  
4 legal representation during the applicable filing period do not  
5 constitute circumstances justifying equitable tolling because  
6 such circumstances are not "extraordinary." See, e.g., Chaffer,  
7 592 F.3d at 1048-49; Waldron-Ramsey, 556 F.3d at 1011-14;  
8 Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006);  
9 Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004). The  
10 vicissitudes of prison life are not "extraordinary"  
11 circumstances that make it impossible to file a timely habeas  
12 petition. See, e.g., Ramirez v. Yates, 571 F.3d 993, 997 (9th  
13 Cir. 2009).

14           The Ninth Circuit Court of Appeals has held that a  
15 petitioner is entitled to tolling of the statute of limitations  
16 if they can establish that they are actually innocent of the  
17 crimes of conviction. See Lee, 653 F.3d at 934. The petitioner  
18 must show "it is more likely than not that no reasonable juror  
19 would have convicted him in the light of the new evidence." Id.  
20 at 938. Petitioner has not made a showing of any new evidence.  
21 Accordingly, Petitioner is not entitled to tolling of the  
22 statute of limitations based on the theory of actual innocence.

23           Because the habeas action was not filed within the  
24 statute of limitations and Petitioner has not stated a proper  
25 basis for equitable tolling of the statute of limitations, the  
26 Court need not consider the merits of his claims.

1                   **III Conclusion**

2                   Petitioner did not file the habeas petition within one  
3 year of the date his state conviction became final. Petitioner  
4 has not established that he is entitled to equitable tolling of  
5 the statute of limitations.

6  
7                   **IT IS THEREFORE RECOMMENDED that** Mr. Adams' Petition  
8 for Writ of Habeas Corpus be denied and dismissed with  
9 prejudice.

10                  This recommendation is not an order that is immediately  
11 appealable to the Ninth Circuit Court of Appeals. Any notice of  
12 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate  
13 Procedure, should not be filed until entry of the District  
14 Court's judgment.


15                  Pursuant to Rule 72(b), Federal Rules of Civil  
16 Procedure, the parties shall have fourteen (14) days from the  
17 date of service of a copy of this recommendation within which to  
18 file specific written objections with the Court. Thereafter, the  
19 parties have fourteen (14) days within which to file a response  
20 to the objections. Pursuant to Rule 7.2, Local Rules of Civil  
21 Procedure for the United States District Court for the District  
22 of Arizona, objections to the Report and Recommendation may not  
23 exceed seventeen (17) pages in length.

24                  Failure to timely file objections to any factual or  
25 legal determinations of the Magistrate Judge will be considered  
26 a waiver of a party's right to de novo appellate consideration  
27 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,

1 1121 (9th Cir. 2003) (en banc). Failure to timely file  
2 objections to any factual or legal determinations of the  
3 Magistrate Judge will constitute a waiver of a party's right to  
4 appellate review of the findings of fact and conclusions of law  
5 in an order or judgment entered pursuant to the recommendation  
6 of the Magistrate Judge.

7 Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District  
8 Court must "issue or deny a certificate of appealability when it  
9 enters a final order adverse to the applicant." The undersigned  
10 recommends that, should the Report and Recommendation be adopted  
11 and, should Petitioner seek a certificate of appealability, a  
12 certificate of appealability should be denied because Petitioner  
13 has not made a substantial showing of the denial of a  
14 constitutional right as required by 28 U.S.C.A § 2253(c)(2).

15 DATED this 1<sup>st</sup> day of July, 2014.

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18 Mark E. Asper  
United States Magistrate Judge  
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